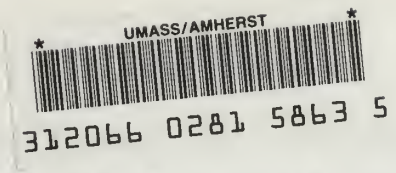

FINAL REPORT TO THE JUSTICES OF THE SUPREME JUDICIAL COURT OF ITS COMMITTEE ON RULES OF PROFESSIONAL CONDUCT

A revised version of the proposed Massachusetts Rules of Professional Conduct with commentary was published in June of 1996. Following receipt of responses after this second publication, the S.J.C. Committee on Rules of Professional Conduct considered all of the comments. This report sets forth recommendations of the Committee in addition to those stated in the May 1996 report.

Revised Rules and Comments

Attached to this report as Appendix A and B, respectively, are the revised rules and comments concerning those rules that the committee recommends for consideration by the Justices. The revisions to the May 1996 draft rules are as follows:

1) In the Preamble, the fifth sentence of paragraph 2, concerning the lawyer as intermediary, has been deleted. This change is consistent with the previous deletion of the rule (A.B.A. Model Rule 2.2) dealing with the lawyer as intermediary.

2) A sentence has been added at the end of Paragraph 4 of the "Scope" portion of the rules. Based on a suggestion by the Attorney General, it states, "These rules are not meant to address the substantive statutory and constitutional authority of the Attorney General when appearing for the Commonwealth to

assume primary control over the litigation and to decide matters of legal policy on behalf of the Commonwealth." This matter may require further consideration if the court accepts the previous recommendation of the committee to appoint a special committee to determine if anything should be done to define further the unique professional responsibilities of government attorneys.

3) In Rule 1.5(a), the "reasonable" fee standard in the first two sentences of Model Rule 1.5(a) has been changed to the present disciplinary standard with respect to overcharges by lawyers, i.e., a "clearly excessive" fee. See DR 2-106.

4) The form contingent fee agreement in Rule 1.5(f) has been changed. The words "or court costs and expenses of litigation" have been added to number 3 on the form concerning the client's liability to pay compensation. This addition reflects the permission granted in Rule 1.8(e)(1) to make repayment of such costs and expenses contingent on the outcome of the matter.

5) Rule 1.6(b) has been amended by the addition of important cross references to Rules 3.3 and 4.1(b) which indicate situations when a lawyer may be required to reveal confidential information. In addition, Rule 1.6(b)(1) contains new language to cover limited situations involving conviction of an innocent person.

6) A cross reference to Rule 4.1 has been added to Rule 1.9(c)(1).

7) The last sentence of Rule 1.15(a) was amended so that the requirement for preserving records is six years, as provided in

DR 9-102(B)(3).

8) Rule 1.17(b) has been "reserved." The effect of the deletion of Model Rule paragraph (b) is to permit sale of a field of practice instead of requiring that a practice be sold as an entirety.

9) Rule 3.3(a)(4) has been amended to make clear that a lawyer's obligation to disclose extends to false material evidence given by others on behalf of the client.

10) Rule 3.3(e) has been revised to clarify a defense lawyer's duties in a criminal case when the lawyer learns that the client intends to testify falsely or has testified falsely. The committee, as stated in the May 1996 report, unanimously supports this version of Rule 3.3(e).

11) The Committee has added at the end of Rule 3.8(c) the words "unless a court first has obtained from the accused a knowing and intelligent written waiver of counsel". A.B.A. Model Rule 3.8(c) does not contain such a provision, permitting a prosecutor to seek a waiver of pretrial rights from an accused if the court has first obtained a written waiver of counsel from the accused.

12) The comments have been revised to reflect the above rule changes. In addition the following comments have been amended: -

a) A new comment paragraph [1A] to Rule 1.3 has been inserted to cover the substance of DR 7-101(A)(3), the prohibition on a lawyer prejudicing or damaging his or her client.

b) Comment paragraph [5] to rule 1.6 has been expanded to provide additional explanation of the term "confidential information."

c) New comment paragraph [2A] to Rule 3.3 concerns the special meaning of "assistance" as used in this rule.

d) Comment paragraph [15] to Rule 3.3 and comment paragraph [1] to Rule 3.8 have been amended to reflect the fact that these rules do not change the rules applicable in situations covered by specific substantive law, such as presentation of evidence to grand juries and applications for search and other investigative warrants.

e) The comments to Rule 9.1 ("Definitions") are new.

Specific Subjects for Decision by the Justices

In addition to the specific subjects listed for decision in the May 1996 report,* the committee recommends the following matters for consideration by the court:

Rule 1.5(e) - The committee voted 8-2 in favor of full disclosure of the amount of the division of fees between lawyers not in the same firm. Because this controversial issue has been left for decision by the court, Rule 1.5(e) has not been amended

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* Rules 1.6 and 4.1 (disclosure of confidential information); Rules 1.10(d) and (e) (screening); Rule 3.3(e) (client perjury); Rule 3.4 (threat of criminal or disciplinary charges); Rule 3.5(d) (post-trial juror contact); Rule 3.8(f) (attorney subpoena); and Rule 8.3 (reporting disciplinary violations).

to include appropriate language. If the court agrees with the majority vote of the committee, Rule 1.5(e) should be amended by inserting after the words "informing the client that a division of fees will be made," the words "and the amount of the division". In the comments to Rule 1.5, the next-to-last sentence of paragraph [4] should be replaced with, "It also requires disclosure to the client of the share that each lawyer is to receive." Also, the last sentence of paragraph [4A] would be deleted and the previous sentence would have the following language added at the end: - "except as noted above that the amount of the fee division must be disclosed to the client." The committee also voted 4-5 against a motion to adopt the language in A.B.A. Model Rule 1.5(e)(1) which provides that a division of fees between lawyers who are not in the same firm may be made only if "the division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation". See the separate statement of Andrew L. Kaufman appended to this report.

Rule 3.4 - The committee voted 4-4 on the suggestion that Rule 3.4 include language prohibiting threats of criminal or disciplinary charges solely to obtain an advantage in a civil matter. See DR 7-105(A). This issue is also suggested as a subject for oral argument.

Rule 4.2 - This rule, concerning dealing with unrepresented persons, is the subject of debate in the federal courts. It

attracted a substantial amount of comment when the draft Rules of Professional Conduct were most recently published. Some members of the committee have suggested that if the negotiating parties compromise in the federal court, the S.J.C. should consider the compromise language. Rule 4.2 is suggested as an additional topic for oral argument.

Oral Argument - In the May 1996 report, the committee recommended that the Justices hold a public hearing limited to specific topics selected by them. The committee now recommends the following matters as subjects for oral argument: (1) Rules 1.6, 3.3, and 4.1 (disclosure of confidential information); (2) Rule 3.4 with reference to including a prohibition on presenting or threatening to present criminal charges or disciplinary action solely to obtain an advantage in a civil matter; (3) Rule 8.3 (obligation to report misconduct); (4) Rule 4.2 (communication with person represented by counsel).

Other Recommendations

The committee considered the case of Commonwealth v. Pavao, 423 Mass. 798 (1996). In that opinion, the Supreme Judicial Court suggested that this committee consider whether the actions of defense counsel, in intentionally not disclosing to the trial court that a legally required colloquy had not taken place, should be subject to an explicit disciplinary rule. The committee concluded that it would be unwise to have an ethical

rule requiring counsel to attempt to correct possible legal errors made by the court or opposing counsel.

The committee incorporates by reference the recommendations made in its May 1996 report to the Justices. It also recommends a period of time, to be determined by the Justices, between the date of promulgation and the effective date of the new Rules of Professional Conduct for the purpose of educating members of the bar.

Respectfully submitted,

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Hon. Herbert P.Wilkins

January, 1997

Separate statement of Andrew L. Kaufman:

I have two comments to make with respect to these "final" recommendations of the Committee on the Rules of Professional Conduct to the Supreme Judicial Court. Both concern Proposed Rule 1.5(e) dealing with forwarding fees. The first is a warning to the bar about a possible trap in the recommended Rules. The second expresses support for Committee action in recommending a small change from the Model Rules.

1. The form in which the Committee has presented its recommendation regarding forwarding fees may lead the bar to conclude that the proposed Rules would resolve an issue that has hitherto been unresolved in Massachusetts -- the responsibility of a lawyer who forwards a matter to another lawyer and receives a percentage of the fee without performing any work. I believe that that would be a dangerously erroneous conclusion.

When the Supreme Judicial Court adopted the Model Code of Professional Responsibility in 1972, it changed the language of the Code's DR 2-107 to permit a forwarding lawyer to share in a fee without sharing in the work. In keeping with the general understanding that the Disciplinary Rules involve matters of ethical conduct and not liability, DR 2-107 as adopted in Massachusetts did not address the issue of the liability of the forwarding lawyer in the event of malpractice by the lawyer who

handled the forwarded matter. The Supreme Judicial Court has never addressed that issue directly.

Under the present Rules, it has been apparent, at least to many lawyers, that the issue of the liability of the forwarding lawyer is an open question. A persuasive argument can be made, however, that a lawyer who forwards a case to a second lawyer and receives a portion of the fee accepts joint responsibility as a matter of substantive law as part of a joint venture. Otherwise the forwarding lawyer is receiving money from the client (or former client) without having performed any service or accepted any responsibility. That would seem to be a paradigm case of a clearly excessive fee under current DR 2-106(A).

The Supreme Judicial Court, interpreting the current Disciplinary Rules in Matter of Fordham, 423 Mass. 481 (1996), has given an expansive definition to the notion of what constitutes an excessive fee: if a client wanting an extraordinary result deliberately chooses a generally experienced trial lawyer because he doesn't want one of the lawyers in the field who usually handles such matters and if the client agrees to pay an hourly fee that includes the time for self-education of the lawyer, the client's consent is not enough to save the lawyer from discipline if the fee that eventuates is judged excessive by ordinary lawyer standards, even if the extraordinary desired results are achieved. The client cannot consent to an excessive fee. A court that finds an excessive fee in the Fordham situation may well find an excessive or unreasonable fee in the situation

of a forwarding lawyer who collects a large fee without doing any work or accepting any responsibility and will, to avoid that possibility, impose joint responsibility liability on the forwarding lawyer. The policy justifications that have warranted allowance of the forwarding fee -- inducing a lawyer not competent to handle a matter to send it to another -- ought not require Massachusetts to give more inducements to such lawyers than most other jurisdictions find necessary.

The problem for Massachusetts lawyers with respect to understanding the Committee's Recommended Rule 1.5(e) arises from a decision made by the Committee to use the framework of the Model Rules as a starting point. Thus, the Committee has not recommended that the current language of DR 2-107 concerning forwarding fees simply be retained. The Committee has used the language of Model Rule 1.5(e) but it has then had to eliminate the Model Rules' requirement, in force in most jurisdictions that have adopted the Model Rules, that both lawyers must accept joint responsibility for the representation if the division of fees is not in proportion to services rendered. A major reason for the Committee's action in eliminating the language of joint responsibility was its understanding that the Supreme Judicial Court had already concluded not to revise the substance of the forwarding fee rules in order to avoid the kind of debate that was thought to have defeated an earlier effort to revise the Disciplinary Rules. The Supreme Judicial Court secured the cooperation of the Massachusetts Bar Association in the current

effort by indicating that the forwarding fee rules would remain essentially untouched.

It may have been a mistake for the American Bar Association to have incorporated a substantive rule of liability into the Model Rules, and it may be the better part of wisdom for the Supreme Judicial Court to eliminate that provision from the Massachusetts Rules, but it would be disastrous if the elimination left Massachusetts lawyers with the idea that the liability issue has been decided. Even before the Fordham opinion, but especially after it, forwarding lawyers who receive a large percentage of the fee and do no work may be making a large error if they think they have no responsibility once they have forwarded the matter. The purpose of this Statement is to set forth my belief that that issue is still an open one and that forwarding lawyers should take great care in their choice of lawyers when making referrals.

2. When this Committee issued the second draft of its Model Rules recommendations in May 1996, I urged in a separate statement that Rule 1.5(e), relating to forwarding fees, be amended to require that clients be informed not only that a division of fees is going to be made but also the amounts that each lawyer will receive. I will not repeat the argument I made there that the failure to add such a requirement could not be justified by any serious policy and that the language of the present DR 2-107(A)(1) -- requiring client consent after "full disclosure that a division of fees will be made" -- could be

interpreted to require disclosure of the amount of the division. That dissent garnered a majority of the Committee at that time. Upon reconsideration, the Committee has voted 8-2 to recommend that the Court amend Rule 1.5(e) to add the requirement that clients receive information about the amount of the division.

The Supreme Judicial Court has supplied additional support for this Committee recommendation in its opinion in the Fordham case. It emphasized that although the lawyer in that case had explained the basis of the fee that he was going to charge, he did not bring home to the client at the time the agreement was entered into the possibility that the eventual fee might be a very large amount. The consent of the client in that regard was therefore held not to have been fully informed. If the Court was prepared to reach that conclusion in the context of a case where the per hour billing was disclosed at the outset and periodic bills were sent all along, I find it difficult to believe that the Court will wish to propound a new Rule that indicates that forwarding lawyers need not disclose to clients the amount that they will receive.

It is true that Rule 1.5 requires that the total fee be reasonable and the court in Fordham concluded that the fee there was excessive, but a client in a forwarding situation where the forwarding lawyer does no work ought to have the opportunity to contend that the total fee is not reasonable because of the amount received by the forwarding lawyer. The client will need the relevant information to do that, and unsophisticated clients

will not know to ask what the fee division will be. The Court that so recently decided Fordham ought to make the Disciplinary Rule consistent with its own reasoning in that opinion. At the very least, if it regards itself as bound by its informal understanding with the Massachusetts Bar Association to make no changes in the forwarding fee rules, it ought then retain the ambiguous wording of the present DR 2-107 and not make an explicit substantive change in the direction of less disclosure.

Separate Statement of Daniel R. Coquillette:

I strongly agree with Professor Kaufman's Separate Statement concerning proposed Rule 1.5(e) with one exception. As I was "of counsel" on briefs in the Matter of Fordham, 423 Mass. 481 (1996), I would prefer not to comment on that holding.